U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th St., Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)

Issue Date: 18 March 2003

Case No: 2002-BLA-5278

In the Matter of

JAMES MONROE ESTEP,
Claimant

v.

JOHN CAIN TRUCKING,
Employer,

INSURANCE COMPANY OF NORTH AMERICA,
Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES:

Monica Rice Smith, Esquire
For the claimant

Philip J. Reverman, Jr., Esquire
For the employer/carrier

Donna E. Sonner, Esquire
For the Director, OWCP

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER — DENYING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act). Benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Surviving dependents of coal miners whose deaths were caused by pneumoconiosis may also recover benefits. Pneumoconiosis, commonly known as black lung, is a chronic dust disease of the lungs arising from coal mine employment. 20 C.F.R. § 718.201(a) (2001).

On June 26, 2002, this case was referred to the Office of Administrative Law Judges for a formal hearing. (DX 37). Following proper notice to all parties, a hearing was held on December 10, 2002 in Hazard, Kentucky. The Director's exhibits were admitted into evidence pursuant to 20 C.F.R. § 725.456, and the parties had full opportunity to submit additional evidence and to present post-hearing briefs.

The Findings of Fact and Conclusions of Law that follow are based upon my analysis of the entire record, arguments of the parties, and the applicable regulations, statutes, and case law. They also are based upon my observation of the demeanor of the witness who testified at the hearing. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. While the contents of certain medical evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformance with the quality standards of the regulations.

The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. References to DX, CX, and EX refer to the exhibits of the Director, claimant, and employer, respectively. The transcript of the hearing is cited as "Tr." and by page number.

ISSUES

The following issues remain for resolution:

1. whether the person upon whose disability this claim is based is a miner;

2. the length of the miner's coal mine employment;

3. whether the miner has pneumoconiosis as defined by the Act and regulations;

4. whether the miner's pneumoconiosis arose out of coal mine employment;

5. whether the miner is totally disabled;

6. whether the miner's disability is due to pneumoconiosis;

7. whether the named employer is the responsible operator;

8. whether the miner's most recent period of cumulative employment of not less than one year was with the responsible operator; and

9. whether the evidence establishes an element previously adjudicated against Claimant within the meaning of Section 725.309(d).

The employer also contests other issues that are identified at line 18 on the list of issues. (DX 37). These issues are beyond the authority of an administrative law judge and are preserved for appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background and Procedural History

The claimant, James Monroe Estep, was born on December 14, 1944. (DX 44). Mr. Estep married Milda Rice on June 13, 1970, and they reside together. (DX 4; Tr. 14). On his application for benefits, claimant alleged that he has one dependent child, Christopher Nathaniel Estep. (DX 4). At the hearing, however, Claimant testified that he had no dependent children. (Tr. 14).

Claimant testified that he began to notice his breathing problems six to eight years ago. (Tr. 18). Currently, he suffers from a dry cough and smothering that awakens him two to three times every night. (Tr. 18, 21). In addition to his breathing problems, Claimant suffers from diabetes, heart problems, and hypertension. (Tr. 20). He also suffered a back injury in 1990 from which he still experiences pain. (Tr. 18, 27). His back injury forced him to quit work in 1990 and squelched a brief return to work in 1992. (Tr. 27). Claimant receives his medical care from the VA Hospital in Lexington, Kentucky. (Tr. 19). Claimant has not been prescribed medication for his respiratory difficulties; however, he has been prescribed Amitriptyline to aid his sleep. (Tr. 19-20).

Claimant testified that his breathing prevents him from performing domestic chores around the house or in his yard. (Tr. 21). He also added that he cannot lift objects or walk any appreciable distance without stopping to catch his breath. (Tr. 20).

Mr. Estep filed his instant application for black lung benefits on February 27, 2001. (DX 4). The Office of Workers' Compensation Programs issued a proposed denial of the claim on March 18, 2002. (DX 30). Pursuant to claimant's request for a formal hearing, the case was transferred to the Office of Administrative Law Judges. (DX 33, 37).

The record also contains Claimant's two previous claims. (DX 1-2). Mr. Estep's original claim was filed on December 3, 1993. (DX 1). The claim was denied by the district director, and

Claimant appealed the decision to an administrative law judge. The administrative law judge subsequently remanded the case to the district director to reexamine the responsible operator issue. The record reflects no further action on behalf of any party after the remand. On March 25, 1999, Claimant filed a second claim for benefits. (DX 2). His claim was again denied by the district director based on Claimant's failure to demonstrate pneumoconiosis or a totally disabling respiratory condition.

Status as Miner

At the hearing, Employer clarified its contestation of Claimant's status as a miner, providing that Employer did not know if Claimant was a miner for other employers. (Tr. 10). Employer argued only that Claimant was not a miner for John Cain Trucking. (Tr. 10-11). Employer, however, did not address this issue in its post-hearing brief.

The 1977 amendments state that the purpose of the Act is to provide benefits, in cooperation with the states, to miners who are totally disabled due to coal workers' pneumoconiosis, and to surviving dependents of miners whose death was due to such disease. 30 U.S.C. § 901(a). Thus, a prerequisite to establishing entitlement to benefits is proving that the claim is on behalf of a coal miner or a survivor of a coal miner. The amended regulations at § 725.101(a)(19) provide:

> Miner or coal miner means any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. The term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal mine dust as a result of such employment (see § 725.202). For purposes of this definition, the term does not include coke oven workers.

20 C.F.R. § 725.101(a)(19) (Dec. 20, 2000).

Moreover, the new regulation at § 725.202(a) provides a new rebuttable presumption that certain individuals are miners and it provides the following:

> (a) Miner defined. A 'miner' for the purposes of this part is any person who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal, and any person who works or has worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility. *There shall be a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner.* This presumption may be rebutted by proof that:
>
> > (1) The person was not engaged in the extraction, preparation, or transportation of coal while working at the mine site, or in maintenance or construction of the mine site; or

> (2) The individual was not regularly employed in or around a coal mine or coal preparation facility.

20 C.F.R. § 725.202(a) (emphasis added).

Section 725.202(b) specifically addresses coal transportation workers. The regulation states:

> (b) Coal mine construction and transportation workers; special provisions. A coal mine construction or transportation worker shall be considered a miner to the extent such individual is or was exposed to coal mine dust as a result of employment in or around a coal mine or coal preparation facility. A transportation worker shall be considered a miner to the extent that his or her work is integral to the extraction or preparation of coal....
>
> > (1) There shall be a rebuttable presumption that such individual was exposed to coal mine dust during all periods of such employment occurring in or around a coal mine or coal preparation facility for purposes of:
> >
> > > (i) Determining whether such individual was or is a miner; ...
> >
> > (2) The presumption may be rebutted by evidence which demonstrates that:
> >
> > > (i) The individual was not regularly exposed to coal mine dust during his or her work in or around a coal mine or coal preparation facility; or
> > >
> > > (ii) The individual did not work regularly in or around a coal mine or coal preparation facility.

20 C.F.R. § 725.202(b). Accordingly, to be a "miner," Claimant must demonstrate that his employment was "integral to the extraction and preparation of coal" and that he worked regularly "in or around a coal mine or coal preparation facility." Employer has not advanced specific proof rebutting the presumption of section 725.202(b)(1). Rather, Claimant's testimony provides that he was exposed to coal dust 1) while he leveled the coal before he placed the tarp on the truck, 2) when he waited at the tipple, 3) in his truck (which he entered and exited frequently), and 4) when he transported coal from the deep mine to the tipple.

Claimant testified at length during the hearing about his coal mine employment. He testified specifically concerning his job duties when he worked for Virgil Raleigh Coal Company and, then, John Cain Trucking. For both companies, Claimant transported coal. Claimant testified that he worked for Virgil Raleigh for ten to eleven years, split between two different time periods. (Tr. 15, 23, 26). His primary responsibility required him to transport coal from the processing plant to third-party purchasers in Louisville, Kentucky. (Tr. 15).

For John Cain Trucking, Claimant transported coal from a strip mine. (Tr. 16). He did not load his own trucks, but he was required to cover the truck bed with a forty to fifty pound tarp. (Tr. 16-17). To do this, Claimant used a shovel to level the coal before he placed the tarp on top of the truck. (Tr. 17). His trucks were equipped with air conditioning, and he alleged that it usually worked, although he also testified that coal dust would still enter the cab of his truck if he opened and closed the door frequently. (Tr. 16). Claimant explained that the only difference in his work at John Cain Trucking, compared to Virgil Raleigh, was that he was also required to transport coal from the deep mine to the tipple. (Tr. 29, 34). He alleged that this occurred approximately two days per week. (Tr. 30, 34).

Coal transportation workers, such as Claimant, have presented a special problem for the Benefits Review Board. Traditionally, the Board and the courts have held that a coal mine includes that area between the site of extraction and the site of preparation, which is, generally, the tipple. Therefore, hauling coal from the mine to the tipple or another preparation facility constituted coal mine employment, while hauling processed coal to private consumers did not. *Norfolk & Western Railway Co. v. Director, OWCP*, 5 F.3d 777 (4th Cir. 1993); *Norfolk & Western Railway Co. v. Roberson*, 918 F.2d 1144, 14 B.L.R. 2-106 (4th Cir. 1990); *Buckley v. Director, OWCP*, 6 B.L.R. 1-1192 (1984); *Roberts v. Director, OWCP*, 6 B.L.R. 1-849 (1984); *Winton v. Director, OWCP*, 2 B.L.R. 1-187 (1979).

The Board previously held that where an individual involved in coal transportation spends time loading at the tipple before transporting the coal to private consumers, the time he or she spent at the tipple constituted coal mine employment. *Flenor v. Director, OWCP*, 6 B.L.R. 1-1274 (1984); *Buckley v. Director, OWCP*, 6 B.L.R. 1-1192 (1984); *Sexton v. Matthews*, 558 F.2d 88 (4th Cir. 1976). The Court reasoned that since loading is part of the definition of coal preparation and, since the loading in that case occurred in or around a coal mine, that portion of time the individual spent loading at the tipple constituted coal mine employment. The Board then changed its approach, specifically overruling *Buckley*. Rather than applying the approach used in *Sexton*, which the Board stated "bifurcates the function of the transportation worker into covered and non-covered periods," the Board adopted the approach enunciated by the Sixth Circuit in *Southard v. Director, OWCP*, 732 F.2d 66 (6th Cir. 1984). As stated by the Board, rather than "mechanically applying statutory and regulatory definitions to each of the transportation worker's tasks in a vacuum, this second approach analyzes whether the particular activities assist in functions that are actually part of coal production and, therefore, covered by the Act, or whether the activities are ancillary instead to the commercial delivery and use of the processed coal." *Swinney v. Director, OWCP*, 7 B.L.R. 1-524 (1984).

Thus, a claimant must establish more than the fact that an activity such as loading occurred at the situs. He must also show that the loading was integral to the extraction or preparation of coal. In *Swinney*, the coal hauler's primary purpose was to deliver coal to his customers, not to perform a function integral to the production of coal. His loading was ancillary to his transportation of coal to customers; therefore, the time he spent at the tipple did not constitute coal mine employment. *See also Clifford v. Director, OWCP*, 7 B.L.R. 1-817 (1985).

In the instant case, Claimant did not load his own coal before he transported it to third-party consumers. His testimony demonstrates that this was Claimant's primary task while he worked for Virgil Raleigh Coal Company and John Cain Trucking. I find Claimant was not engaged in coal mining when he transported coal from the tipple to consumers. Beyond transportation, the only other activity Claimant engaged in would be leveling the coal before he placed the tarp on the truck. He testified that he did this for every load. (Tr. 17). I find this act, however, was merely ancillary to his transportation job and not integral to the coal production process. Indeed, Claimant testified that this act was not performed at the tipple, but, rather, he would drive several hundred feet away from the tipple and then level the coal. *Id.*

When Claimant transported coal from the deep mine to the tipple for John Cain Trucking, however, he was a miner. Moving the coal to the tipple was "transportation of coal while working at [a] mine site." 20 C.F.R. § 725.202(a)(1). Obviously, moving coal from the mine to the tipple is an integral part of the coal mining process. *See Swinney v. Director, OWCP*, 7 B.L.R. 1-524 (1984); *Clifford v. Director, OWCP*, 7 B.L.R. 1-817 (1985). Furthermore, I find that Claimant's testimony establishes that he performed this task two days per week at the mine site. Thus, he has established that he was engaged in employment occurring in or around a coal mine or coal preparation facility. For those days he moved coal from the deep mine to the tipple, he was involved in an integral part of the coal mining process occurring at the mine site, and, thus, he was a miner.

Coal Mine Employment

The duration of a miner's coal mine employment is relevant to the applicability of various statutory and regulatory presumptions. Claimant bears the burden of proof in establishing the length of his coal mine work. *See Shelesky v. Director, OWCP*, 7 BLR 1-34, 1-36 (1984); *Rennie v. U.S. Steel Corp.*, 1 BLR 1-859, 1-862 (1978). On his application for benefits, Claimant alleged fifteen years of coal mine employment. (DX 4). His Coal Mine Employment History form listed two coal mine employers (Virgil Raleigh Coal Company and John Cain Trucking) but only provided dates of employment totaling nine years as Claimant listed only "?" for his dates of employment with John Cain Trucking. (DX 5). Employer stipulated to six years of coal mine employment when Claimant worked for other employers. (Tr. 11-12).

The evidence in the record includes a Social Security Statement of Earnings encompassing the years 1960 to 2000, employment history forms, applications for benefits, and claimant's testimony. (DX 4-9; Tr. 13-34).

The Social Security records reveal employment with Virgil Raleigh Coal Company from 1980 to 1981 and 1986 to 1991. (DX 9). The dates of employment with John Cain Trucking are 1982 to 1985. *Id.* I shall first address Claimant's employment with Virgil Raleigh Coal Company, and then proceed to compute the length of employment with John Cain Trucking. The Social Security records reflect eight different years in which Claimant worked for Virgil Raleigh, from 1980 to 1981 and from 1986 to 1991. The records reflect full calender year employment from 1987 to 1990. Thus, pursuant to the presumption of section 725.101(a)(32)(ii), I credit Claimant with four years of employment between 1987 and 1990. I shall compute the remaining years of employment with Virgil Raleigh utilizing the regulatory formula in section 725.101 (a)(32)(iii).

The Social Security records provide that Claimant earned $3,894.94 in 1980 from coal mine employment. The average daily wage that year was $87.42. Thus, Claimant's earnings would reflect 44.55 working days that year. As the regulations provide that one year equals 125 working days, I credit Claimant with 0.36 year of employment for 1980.

Claimant earned $13,542.00 in 1981 from coal mine employment. The average daily wage that year was $96.80. Thus, Claimant's earnings would reflect 139.90 working days that year. As the regulations provide that one year equals 125 working days, I credit Claimant with 1.0 year of employment for 1981.

Claimant earned $23,407.00 in 1986 from coal mine employment. The average daily wage that year was $123.12. Thus, Claimant's earnings would reflect 190.12 working days that year. As the regulations provide that one year equals 125 working days, I credit Claimant with 1.0 year of employment for 1986.

Claimant earned $184.44 in 1991 from coal mine employment. The average daily wage that year was $136.64. Thus, Claimant's earnings would reflect 1.35 working days that year. As the regulations provide that one year equals 125 working days, I credit Claimant with 0.01 year of employment for 1991.

In sum, I credit Claimant with 6.37 years of employment with Virgil Raleigh Coal Company.

The Social Security records reflect employment with John Cain Trucking for Claimant from 1982 to 1985. The records reflect full calender year employment from 1983 to 1984. Thus, pursuant to the presumption of section 725.101(a)(32)(ii), I credit Claimant with two years of employment between 1983 and 1984. I shall compute the remaining years of employment with John Cain Trucking utilizing the regulatory formula in section 725.101(a)(32)(iii).

The records provide that Claimant earned $5,079.99 in 1982 from coal mine employment. The average daily wage that year was $101.59. Thus, Claimant's earnings would reflect 50.00 working days that year. As the regulations provide that one year equals 125 working days, I credit Claimant with 0.4 year of employment for 1982.

Claimant earned $13,734.52 in 1985 from coal mine employment. The average daily wage that year was $122.00. Thus, Claimant's earnings would reflect 112.58 working days that year. As the regulations provide that one year equals 125 working days, I credit Claimant with 0.90 year of employment for 1985.

In sum, the Social Security records reflect 3.3 years of employment with John Cain Trucking.

Combining the figures for both employers, the Social Security records demonstrate 9.67 years of employment. Because the evidence, including Claimant's own testimony, demonstrates that Claimant was not engaged in coal mining during his entire tenure with both companies, alterations must be made to the figures. Specifically, time spent solely hauling coal to consumers does not qualify as coal mine employment and must be omitted from determining Claimant's length of coal mine employment. *See Bowman v. Director, OWCP*, 7 B.L.R. 1-718 (1985). Claimant testified that he only hauled coal from tipple to consumer while he worked for Virgil Raleigh Coal Company. (Tr. 29-30, 34). Because this does not constitute coal mine employment, I cannot credit Claimant's time at Virgil Raleigh. Accordingly, Claimant has not demonstrated the 6.37 years of coal mine employment reflected by the figures in the Social Security records.

The record is unclear regarding the exact amount of time Claimant devoted to hauling coal from the deep mine to the tipple for John Cain Trucking. (Tr. 30, 34). Claimant did not specify if hauling the coal from the deep mine to the tipple, which he alleged he did two days per week, required all of his work day. As nothing in the record contradicts such a finding, and I find his testimony credible, I find Claimant hauled coal from the deep mine to the tipple two days out of his work week. Granting Claimant an average, five day work week, he was engaged in coal mining 40% of the time. As the records demonstrate 3.3 years of employment with John Cain Trucking, I credit Claimant with 1.32 year of coal mine employment with John Cain Trucking.

All of Claimant's alleged coal mine employment involved driving a coal truck from the deep mine to the tipple. Claimant testified to no other responsibilities with his truck driving. His duty to level the coal and place a tarp on the truck occurred while he was transporting the coal and not when he was engaged in coal mining. I find the evidence establishes that Claimant's job was a light, sedentary job that required little exertional output. Assuming, arguendo, Claimant performed supplemental tasks – like leveling the coal and placing the tarp over the truck bed – during his trips from the deep mine to the tipple, I would continue to find his job was sedentary with little required exertion.

Responsible Operator

Liability for payment of benefits to eligible miners and their survivors rests with the responsible operator or, if the responsible operator is unknown or is unable to pay benefits, liability is assessed against the Black Lung Disability Trust Fund. For an employer to be named a responsible operator, certain statutory and regulatory requirements must be met. Direct employer liability for payment of claims can only result where the miner ceased coal mine employment after December 31, 1969. 20 C.F.R. § 725.494(d). Moreover, an employer is liable only for the payment of benefits for any period after December 31, 1973. 20 C.F.R. § 725.494(c).

Employer contests its selection as responsible operator not on its failure to satisfy the definition of a responsible operator, but rather on its belief that the Department of Labor is compelled to identify the responsible operator before Claimant's first claim. (Employer's Clos-ing Brief p. 4-5). Employer cites *Crabtree v. Bethlehem Steel Corp.*, 7 B.L.R. 1-354 (1984) for support. A review of *Crabtree* and the applicable regulations does not support Employer's position. First, the applicable regulation provides no barrier to the district director's selection of a responsible operator before the case has been transferred to Office of Administrative Law Judges. 20 C.F.R. §725.407. Second, the *Crabtree* decision involved identification of a new responsible operator during a single claim. In the instant case, Employer has been identified as the responsible operator at the beginning of a duplicate claim. Neither the regulations nor the relevant case law holds that, once a responsible operator has been identified the first time and gone before the Office of Administrative Law Judges, a new responsible operator cannot be named. Employer's argument is based on the mistaken predicate that a duplicate claim is not a separate claim from the original claim. When Employer was identified as the responsible operator, Claimant's *duplicate* claim had not been tried on the merits. Thus, neither of the guiding rationales behind *Crabtree* (due process and administrative ease) are violated with Employer's selection as responsible operator. *Cf. Director, OWCP v. Oglebay Norton*, 877 F.2d 1300 (6th Cir. 1989); *Lewis v. Consolidation Coal Co.*, 15 B.L.R. 1-37 (1990); *Beckett v. Raven Smokeless Coal Co.*, 14 B.L.R. 1-43 (1990).

The threshold requirement for identification of the responsible operator is determining whether an "operator" is involved. Subsection 725.491(a), defines "operator" as "[a]ny owner, lessee or other person who operates, controls, or supervises a coal mine or any independent contractor performing services or construction at such mine." The evidence clearly establishes that John Cain Trucking is an "operator" under the regulations as the company performed services at the mine, as an independent contractor, by moving coal from the deep mines to the tipple.

An operator may be considered a "potentially liable operator" if: 1) the operator was an operator for any period after June 30, 1973; 2) the miner was employed by the operator for a cumulative period of not less than one year; 3) the miner's employment with the operator included at least one working day after December 31, 1969; and 4) the operator is capable of assuming its liability for the payment of continuing benefits. 20 C.F.R. §725.494(b-e). Section 725.494 also requires that the miner's disability or death arose at least in part out of employment in or around a

mine during a period when the mine was operated by such operator; however, the subsection presumes this element until rebutted. 20 C.F.R. §725.494(a). Section 725.495(b) presumes, in the absence of evidence to the contrary, that the designated responsible operator is capable of assuming liability for the payment of benefits.

The record also reveals that John Cain Trucking is the most recent "potentially liable operator." Employer operated after June 30, 1973 and employed Claimant for over one year in coal mine work including one day after December 31, 1969. Furthermore, Employer has provided the Court with no evidence indicating an inability to pay benefits, if awarded. Accordingly, I find Employer has been named correctly the responsible operator of the instant case.

Medical Evidence

Medical evidence submitted under a claim for benefits under the Act is subject to two different requirements. First, medical evidence must be in "substantial compliance" with the applicable regulations' criteria for the development of medical evidence. *See* 20 C.F.R. §718.101 to 718.107. The regulations address the criteria for chest x-rays, pulmonary function tests, physician reports, arterial blood gas studies, autopsies, biopsies, and "other medical evidence." *Id.* "Substantial compliance" with the applicable regulations entitles medical evidence to probative weight as valid evidence.

Secondly, medical evidence must comply with the limitations placed upon the development of medical evidence. 20 C.F.R. §725.414. The regulations provide that claimants are limited to submitting no more than two chest x-rays, two pulmonary function tests, two arterial blood gas studies, one autopsy report, one biopsy report of each biopsy, and two medical reports as affirmative proof of their entitlement to benefits under the Act. §725.414(a)(2)(i). Any chest x-ray interpretations, pulmonary function test results, arterial blood gas study results, autopsy reports, biopsy reports, and physician opinions that appear in one single medical report must comply individually with the evidentiary limitations. *Id.* In rebuttal to evidence propounded by an opposing party, a claimant may introduce no more than one physician's interpretation of each chest x-ray, pulmonary function test, arterial blood gas study, biopsy, or autopsy. § 725.414 (a)(2)(ii).[1] Likewise, responsible operators and the district director are subject to identical limitations on affirmative and rebuttal evidence. §725.414(a)(3)(i, iii).[2]

[1] Rebuttal evidence is indicated in the chart below by "R-" prefix before the exhibit number, such as R-DX2 or R-EX4.

[2] If no responsible operator has been named, the evidence obtained in connection with the complete pulmonary evaluation performed pursuant to §725.406 shall be considered evidence obtained and submitted by the Director.

Both parties submitted selections made pursuant to the applicable evidentiary limitations. (CX 1; EX 3). To make my decision concerning Claimant's entitlement to benefits, I shall only consider evidence selected by the respective parties.

A. X-ray reports[3]

Exhibit	Date of X-ray	Date of Reading	Physician/ Qualifications	Interpretation
DX 17 Claimant	03/28/01	03/28/01	Baker	1/0 pneumoconiosis
EX 1 Rebuttal	03/28/01	09/03/02	Wiot/B[4]/BCR[5]	Completely negative
DX 15	05/08/01	05/08/01	Simpao	1/1 pneumoconiosis
EX 1 Rebuttal	05/08/01	09/03/02	Wiot/B/BCR	Completely negative
EX 2	09/06/02	09/06/02	Dahhan/B	Completely negative

[3] A chest x-ray may indicate the presence or absence of pneumoconiosis. 20 C.F.R. §718.102(a,b). It is not utilized to determine whether the miner is totally disabled, unless complicated pneumoconiosis is indicated wherein the miner may be presumed to be totally disabled due to the disease.

[4] A "B" reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successfully completing an examination conducted by or on behalf of the Department of Health and Human Services. *See* 42 C.F.R. § 37.51(b)(2). Interpretations by a physician who is a "B" reader and is certified by the American Board of Radiology may be given greater evidentiary weight than an interpretation by any other reader. *See Woodward v. Director, OWCP*, 991 F.2d 314, 316 n.4 (6th Cir. 1993); *Herald v. Director, OWCP*, BRB No. 94-2354 BLA (Mar. 23, 1995)(unpublished). When evaluating interpretations of miners' chest x-rays, an administrative law judge may assign greater evidentiary weight to readings of physicians with superior qualifications. 20 C.F.R. § 718.202(a)(1); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211, 1-213 (1985). The Benefits Review Board and the United States Court of Appeals for the Sixth Circuit have approved attributing more weight to interpretations of "B" readers because of their expertise in x-ray classification. *See Warmus v. Pittsburgh & Midway Coal Mining Co.*, 839 F.2d 257, 261 n.4 (6th Cir. 1988); *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773, 1-776 (1984). The Board has held that it is also proper to credit the interpretation of a dually qualified physician over the interpretation of a B-reader. *Cranor v. Peabody Coal Co.*, 22 B.L.R. 1-1 (1999) (en banc on recon.); *Sheckler v. Clinchfield Coal Co.*, 7 B.L.R. 1-128 (1984). *See also Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985) (weighing evidence under Part 718).

[5] Board certified readiologist

B. Pulmonary Function Studies[6]

Exhibit/ Date	Physician	Age/ Height	FEV_1	FVC	MVV	FEV_1/ FVC	Tracings	Comments
DX 17 03/28/01	Baker	56 68’	2.16	2.82	81	0.77	Yes	Coughing on MVV.
DX 15 05/08/01	Simpao	56 67.5’	2.20	3.04	93		Yes	Good cooperation and comprehen-sion. Reduced vital capacity and flow volume curve. Indicates moderate degree restrictive and obstructive airway disease.
EX 2 09/06/02	Dahhan	57 68’	2.43 2.35*	3.08 3.07*	87 91*	0.79 0.77*	Yes	Normal. Good cooperation and comprehension.

*denotes testing after administration of bronchodilator

[6] The pulmonary function study, also referred to as a ventilatory study or spirometry, indicates the presence or absence of a respiratory or pulmonary impairment. 20 C.F.R. § 718.104 (c) . The regulations require that this study be conducted three times to assess whether the miner exerted optimal effort among trials, but the Board has held that a ventilatory study which is accompanied by only two tracings is in “substantial compliance” with the quality standards at § 718.204(c)(1). *Defore v. Alabama By-Products Corp.*, 12 B.L.R. 1-27 (1988). The values from the FEV1 as well as the MVV or FVC must be in the record, and the highest values from the trials are used to determine the level of the miner's disability.

C. Arterial Blood Gas Studies[7]

Exhibit	Date	Physician	pCO_2	pO_2	Resting/ Exercise	Comments
DX 17	03/28/01	Baker	39	89	Resting	
DX 15	05/08/01	Simpao	41.7	81.4	Resting	Normal
EX 2	09/06/02	Dahhan	42.1	91.4	Resting	Normal. Exercise terminated due to fatigue.

D. Narrative Medical Evidence

Dr. Glen Baker, board certified in internal medicine and pulmonary disease, administered a complete pulmonary examination on March 28, 2001, including a physical examination, chest x-ray, pulmonary function test, and arterial blood gas study. (DX 17). Dr. Baker recorded that Claimant presented a fifteen year, six month coal mine employment history as a truck driver and heavy equipment operator and a twenty to twenty-five year, up to three packs per day smoking history ending fifteen years earlier. Claimant's chief complaints during the examination included daily symptoms of cough, sputum production, and variable wheezing over the past five to six years. Claimant also reported difficulty sleeping because of his symptoms. Claimant provided that his symptoms were aggravated by exertion, cold air, dust, odors, and fumes, and he estimated that he could walk 100 yards on level ground or climb one flight of stairs before he needed to stop and catch his breath. In addition to his respiratory problems, Dr. Baker noted that Claimant suffered from back problems. Dr. Baker included the following results in his report: 1) chest x-ray positive for pneumoconiosis; 2) physical examination revealed bilateral expiratory wheezing; 3) pulmonary function testing revealed mild restrictive ventilatory defect; and 4) arterial blood gas results normal. The doctor diagnosed coal workers' pneumoconiosis based on Claimant's abnormal x-ray and significant history of dust exposure, mild restrictive ventilatory defect based on pulmonary function testing, and chronic bronchitis based on history. Dr. Baker concluded that Claimant's pneumoconiosis arose out of coal mine employment, stating, "Patient has x-ray evidence of pneumoconiosis and a long history of coal dust exposure. He has no other condition to account for these x-ray changes." *Id.* The doctor also opined that Claimant was totally disabled from coal mine employment. Dr. Baker stated that Claimant suffered from a "Class II" impairment predicated upon Claimant's FEV_1 and vital capacity measurements be- tween 60% and 80%. In addition, Dr. Baker opined that Claimant suffers from a second impairment due to pneumoconiosis, stating, "Patient has a second impairment...based on [the] Guides to the

[7] Blood-gas studies are performed to detect an impairment in the process of alveolar gas exchange. This defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. 20 C.F.R. §718.105(a).

Evaluation of Permanent Impairment, Fifth Edition, which states that persons who develop pneumoconiosis should limit further exposure to the offending agent. This would imply the patient is 100% occupationally disabled for work in the coal mining industry or any similar dusty occupation." *Id.* Addressing the etiology of the impairment, Dr. Baker added, "Patient does have a long history of smoking as well as x-ray evidence of pneumoconiosis. It is thought that any pulmonary impairment is caused at least in part by his coal dust exposure." *Id*.

On May 8, 2001, Dr. Valentino S. Simpao administered a complete pulmonary examination of Claimant consisting of a physical examination, chest x-ray, pulmonary function testing, arterial blood gas study, and electrocardiogram. Dr. Simpao took Claimant's employment, family, and medical histories, specifically noting that Claimant presented a fifteen year, six month surface coal mine employment history and a twenty year, three packs per day smoking history. The doctor also noted injuries to Claimant's back and left leg. During the examination, Claimant's chief complaints were cough, sputum production, wheeze, and dyspnea, all of which Claimant alleged to have onset ten years earlier. Claimant also relayed symptoms of orthopnea, ankle edema, and paroxysmal nocturnal dyspnea, all of which Claimant alleged to have onset seven to eight years earlier. Claimant reported that he avoided lifting and climbing due to shortness of breath. Walking at a fast pace or climbing an incline also took his breath away, Claimant reported. Dr. Simpao reported the following results from his examination: 1) physical examination revealed increased resonance in upper chest and axillary areas, crepitations, and occasional forced expiratory wheezes; 2) x-ray interpreted positive for pneumoconiosis; 3) pulmonary function test results revealed moderate degree restrictive and obstructive airway disease; 4) arterial blood gas study results normal; and 5) electrocardiogram results demonstrate "nonspecific ST changes." Dr. Simpao diagnosed coal workers' pneumoconiosis based on his x-ray interpretation, pulmonary function test, physical findings, and symptomatology. The doctor stated the etiology of Claimant's pneumoconiosis was "multiple years of coal dust exposure." *Id.* Dr. Simpao also opined that Claimant suffered from a moderate respiratory impairment based upon his x-ray interpretation, pulmonary function test, physical findings, and symptomatology. The doctor concluded that Claimant did not possess the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust free environment.

Dr. Abdul Dahhan administered a complete pulmonary examination on September 6, 2002, including a physical examination, chest x-ray, pulmonary function test, arterial blood gas study, and electrocardiogram. (EX 2). Dr. Dahhan noted that Claimant presented fourteen years of coal mine employment as a loader and a fifteen year, one pack per day smoking history ending twenty years ago. Claimant presented the doctor with a history of hacking cough, intermittent wheeze, and dyspnea upon exertion such as a flight of stairs. Dr. Dahhan reported the following results: 1) physical examination showed good air entry to both lungs with no crepitation, rhonci, or wheeze; 2) electrocardiogram results revealed regular sinus rhythms with non-specific ST changes; 3) arterial blood gas study results normal; 4) pulmonary function test results normal; and 5) chest x-ray negative for pneumoconiosis. The doctor reached the following conclusions:

1) insufficient evidence existed to diagnose coal workers' pneumoconiosis based upon normal clinical examination of the chest, normal pulmonary function test results, and negative chest x-ray; 2) no objective findings to indicate total or permanent pulmonary disability based on the clinical and physiological parameters of Claimant's respiratory system; and 3) Claimant retains the respiratory capacity to perform his usual coal mine employment. Dr. Dahhan diagnosed Claimant with low back pain, which
he stated was a condition of the general public and not related to coal dust or coal workers' pneumoconiosis.

DISCUSSION AND APPLICABLE LAW

Because Claimant filed his application for benefits after March 31, 1980, this claim shall be adjudicated under the regulations at 20 C.F.R. Part 718. Under this part of the regulations, claimant must establish by a preponderance of the evidence that he has pneumoconiosis, that his pneumoconiosis arose from coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. Failure to establish any of these elements precludes entitlement to benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Refiled Claim

In cases where a claimant files more than one claim and a prior claim has been finally denied, later claims must be denied on the grounds of the prior denial unless "the claimant demonstrates that one of the applicable conditions of entitlement has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. § 725.309(d). If a claimant establishes the existence of an element previously adjudicated against him, the administrative law judge must consider whether all the evidence of record, including evidence submitted with the prior claims, supports a finding of entitlement to benefits.

Accordingly, I must review the evidence submitted subsequent to June 30, 1999, the date of the prior final denial, to determine whether claimant has proven at least one of the elements that was decided against him. The following elements were decided against Claimant in the prior denial: (1) the existence of pneumoconiosis; (2) pneumoconiosis arising from coal mine employment; (3) total disability; and (4) total disability due to pneumoconiosis. If Claimant establishes any of these elements with new evidence, he will have demonstrated an element previously adjudicated against him. Then, I must review the entire record to determine entitlement to benefits.

Pneumoconiosis and Causation

The new regulatory provisions at 20 C.F.R. § 718.201 contain a modified definition of "pneumoconiosis" and they provide the following:

(a) For the purposes of the Act, 'pneumoconiosis' means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or 'clinical', pneumoconiosis and statutory, or 'legal', pneumoconiosis.

(1) Clinical Pneumoconiosis. 'Clinical pneumoconiosis' consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

(2) Legal Pneumoconiosis. 'Legal pneumoconiosis' includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

(b) For purposes of this section, a disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

(c) For purposes of this definition, 'pneumoconiosis' is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

20 C.F.R. § 718.201 (Dec. 20, 2000). Section 718.202(a) provides four methods for determining the existence of pneumoconiosis. Each shall be addressed in turn.

Under section 718.202(a)(1), a finding of pneumoconiosis may be based upon x-ray evidence. Because pneumoconiosis is a progressive disease, I may properly accord greater weight to the interpretations of the most recent x-rays, especially where a significant amount of time separates the newer from the older x-rays. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc); *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). As noted above, I also may assign heightened weight to the interpretations by physicians with superior radiological qualifications. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Clark*, 12 BLR 1-149 (1989).

The record contains five interpretations of three chest x-rays. Of these interpretations, three were negative for pneumoconiosis while two were positive. Both x-ray films producing positive interpretations (by non-credentialed physicians) were subsequently interpreted as negative

by a dually-qualified physician. Because the negative readings constitute the majority of interpretations and are verified by more, highly-qualified physicians, I find that the x-ray evidence is negative for pneumoconiosis.

Under Section 718.202(a)(2), a claimant may establish pneumoconiosis through biopsy or autopsy evidence. This section is inapplicable herein because the record contains no such evidence.

Under Section 718.202(a)(3), a claimant may prove the existence of pneumoconiosis if one of the presumptions at Sections 718.304 to 718.306 applies. Section 718.304 requires x-ray, biopsy, or equivalent evidence of complicated pneumoconiosis. Because the record contains no such evidence, this presumption is unavailable. The presumptions at Sections 718.305 and 718.306 are inapplicable because they only apply to claims that were filed before January 1, 1982, and June 30, 1982, respectively. Because none of the above presumptions applies to this claim, claimant has not established pneumoconiosis pursuant to Section 718.202(a)(3).

Section 718.202(a)(4) provides the fourth and final way for a claimant to prove that he has pneumoconiosis. Under section 718.202(a)(4), a claimant may establish the existence of the disease if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that he suffers from pneumoconiosis. Although the x-ray evidence is negative for pneumoconiosis, a physician's reasoned opinion may support the presence of the disease if it is supported by adequate rationale besides a positive x-ray interpretation. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993); *Taylor v. Director, OWCP*, 1-22, 1-24 (1986). The weight given to each medical opinion will be in proportion to its documented and well-reasoned conclusions.

A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). A report may be adequately documented if it is based on items such as a physical examination, symptoms and patient's history. *See Hoffman v. B & G Construction Co.*, 8 BLR 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984); *Buffalo v. Director,* OWCP, 6 BLR 1-1164, 1-1166 (1984); *Gomola v. Manor Mining and Contracting Corp.*, 2 BLR 1-130 (1979).

A "reasoned" opinion is one in which the underlying documentation and data are adequate to support the physician's conclusions. *See Fields, supra*. The determination that a medical opinion is "reasoned" and "documented" is for this Court to determine. *See Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc). An unsupported medical conclusion is not a reasoned diagnosis. *Fuller v. Gibraltar Corp.*, 6 B.L.R. 1-1292 (1984). *See also Phillips v. Director, OWCP*, 768 F.2d 982 (8th Cir. 1985); *Smith v. Eastern Coal Co.*, 6 B.L.R. 1-1130 (1984); *Duke v. Director, OWCP*, 6 B.L.R. 1-673 (1983) (a report is properly discredited where the physician does not explain how underlying documentation supports his or her diagnosis); *Waxman v. Pittsburgh & Midway Coal Co.*, 4 B.L.R. 1-601 (1982).

The record includes narrative opinions from three physicians, Drs. Baker, Simpao, and Dahhan. I shall discuss and weigh each opinion, individually.

Dr. Baker diagnosed pneumoconiosis solely based upon Claimant's history of dust exposure and abnormal x-ray. In *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000), the Sixth Circuit Court of Appeals intimated that such bases alone do not constitute "sound" medical judgment under section 718.202(a)(4). *Id.* at 576. The Benefits Review Board has also held permissible the discrediting of physician opinions amounting to no more than x-ray reading restatements. *See Worhach v. Director, OWCP*, 17 B.L.R. 1-105, 1-110 (1993)(citing *Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-113(1989), and *Taylor v. Brown Badgett, Inc.*, 8 B.L.R. 1-405 (1985)). In *Taylor*, the Benefits Review Board explained that the fact that a miner worked for a certain period of time in the coal mines alone "does not tend to establish that he does not have any respiratory disease arising out of coal mine employment." *Taylor*, 8 B.L.R. at 1-407. The Board went on to state that, when a doctor relies solely on a chest x-ray and a coal dust exposure history, a doctor's failure to explain how the duration of a miner's coal mine employment supports his diagnosis of the presence or absence of pneumoconiosis renders his or her opinion "merely a reading of an x-ray...and not a reasoned medical opinion." *Id.* In the instant case, I find the opinion of Dr. Baker amounts to no more than an x-ray reading. The doctor provides neither discussion nor analysis that would demonstrate that his opinion is more than a x-ray reading, nor does he provide any other basis for his pneumoconiosis opinion. Accordingly, I grant his opinion no weight.

I find Dr. Simpao's opinion to be well reasoned and well documented. The doctor catalogs his objective test results, and he reaches clear conclusions based upon rationales following reasonably from his reported data. Accordingly, I grant his opinion probative weight.

Similarly, I find Dr. Dahhan's opinion well reasoned and well documented. The doctor's findings are well supported by his reported data, and he sufficiently explains the rationales behind his negative pneumoconiosis diagnosis. Accordingly, I grant his opinion probative weight.

Reviewing the narrative pneumoconiosis evidence as a whole, I find the evidence is in equipoise. I grant no weight to Dr. Baker's opinion, and, thus, I am left with Dr. Simpao's positive diagnosis counter-balanced by Dr. Dahhan's negative diagnosis. I find the opinions of Drs. Simpao and Dahhan equally probative. As it is Claimant's burden to establish pneumoconiosis by a preponderance of the evidence, I find Claimant has failed to establish this element of entitlement under section 718.202(a)(4).

Drs. Baker opined that Claimant suffered from chronic bronchitis. Dr. Baker based his opinion on Claimant's "history." In *Hughes v. Clinchfield Coal Co.*, 21 B.L.R. 1-134, 1-139 (1999), the Board held that chronic bronchitis falls within the definition of pneumoconiosis if it

is related to the claimant's coal mine employment. While Dr. Baker opined that Claimant's coal workers' pneumoconiosis arose out of his coal mine employment because "no other condition...account[s] for these x-ray changes," he did not provide an etiology opinion concerning Claimant's chronic bronchitis. I do not interpret the doctor's diagnosis of chronic bronchitis as a diagnosis of legal pneumoconiosis based upon the absence of a diagnosis of etiology. Accordingly, I find the evidence insufficient to demonstrate legal pneumoconiosis arising out of coal mine employment.

Assuming, arguendo, that I credit Dr. Baker's report as diagnosing legal pneumoconiosis arising out of coal mine employment, I would continue to conclude that the preponderance of the narrative evidence weighs against a positive finding of clinical or legal pneumoconiosis. Dr. Dahhan adequately addressed the presence of *any* pulmonary or respiratory disease and impairment, and he concluded that none existed. Dr. Baker's opinion cites no basis other than Claimant's "history." Greater weight may be accorded that opinion which is supported by more extensive documentation over the opinion which is supported by limited medical data. *See Sabett v. Director*, OWCP, 7 B.L.R. 1-229 (1984). Simply put, the probative value of the well reasoned and well documented opinion of Dr. Dahhan would outweigh the probative value of the legal pneumoconiosis opinion of Dr. Baker. Even if I considered Dr. Baker's report to be as probative as Dr. Dahhan's report, the evidence would be in equipoise because Dr. Simpao did not opine as to legal pneumoconiosis. In this scenario, Claimant would still fail to meet his burden.

The claimant has failed to demonstrate, by a preponderance of the evidence, the existence of pneumoconiosis under any of the methods contained in section 718.202(a). As the evidence does not establish the existence of pneumoconiosis, this claim cannot succeed. Regardless, even if the evidence had established this element, it fails to prove that claimant has a totally disabling respiratory impairment, another requisite element of entitlement.

Total Disability Due to Pneumoconiosis

A miner is considered totally disabled when his pulmonary or respiratory condition prevents him from performing his usual coal mine work or comparable work. 20 C.F.R. § 718.204 (b)(1). Non-respiratory and non-pulmonary impairments have no bearing on a finding of total disability. *See Beatty v. Danri Corp.*, 16 BLR 1-11, 1-15 (1991). Section 718.204(b)(2) provides several criteria for establishing total disability. Under this section, I must first evaluate the evidence under each subsection and then weigh all of the probative evidence together, both like and unlike evidence, to determine whether claimant has established total respiratory disability by a preponderance of the evidence. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1987).

Under Sections 718.204(b)(2)(i) and (b)(2)(ii), total disability may be established with qualifying pulmonary function tests or arterial blood gas studies.[8]

In the pulmonary function studies of record, there is a discrepancy in the height attributed to the claimant. The fact-finder must resolve conflicting heights of the miner recorded on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1- 221 (1983). *See also Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109 (4th Cir. 1995). To evaluate the pulmonary function tests of record, I shall use the average of the reported heights for Claimant, or 67.83 inches.

All ventilatory studies of record, both pre-bronchodilator and post- bronchodilator, must be weighed. *Strako v. Ziegler Coal Co.*, 3 B.L.R. 1-136 (1981). To be qualifying, the FEV_1 as well as the MVV or FVC values must equal or fall below the applicable table values. *Tischler v. Director, OWCP*, 6 B.L.R. 1-1086 (1984). I must determine the reliability of a study based upon its conformity to the applicable quality standards, *Robinette v. Director, OWCP*, 9 B.L.R. 1- 154 (1986), and must consider medical opinions of record regarding reliability of a particular study. *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). In assessing the reliability of a study, I may accord greater weight to the opinion of a physician who reviewed the tracings. *Street v. Consolidation Coal Co.*, 7 B.L.R. 1-65 (1984). Because tracings are used to determine the reliability of a ventilatory study, a study which is not accompanied by three tracings may be discredited. *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984). If a study is accompanied by three tracings, then I may presume that the study conforms unless the party challenging conformance submits a medical opinion in support thereof. *Inman v. Peabody Coal Co.*, 6 B.L.R. 1-1249 (1984). Also, little or no weight may be accorded to a ventilatory study where the miner exhibited "poor" cooperation or comprehension. *Houchin v. Old Ben Coal Co.*, 6 B.L.R. 1-1141 (1984); *Runco v. Director, OWCP*, 6 B.L.R. 1-945 (1984); *Justice v. Jewell Ridge Coal Co.*, 3 B.L.R. 1-547 (1981).

The pulmonary function tests submitted after the previous denial conform to the applicable quality standards. The tests did not produce qualifying values, however. Accordingly, I find they present probative evidence weighing against a finding that Claimant is totally disabled.

All blood gas study evidence of record must be weighed. *Sturnick v. Consolidation Coal Co.*, 2 B.L.R. 1-972 (1980). This includes testing conducted before and after exercise. *Coen v. Director, OWCP*, 7 B.L.R. 1-30 (1984); *Lesser v. C.F. & I. Steel Corp.*, 3 B.L.R. 1-63 (1981). In order to render a blood gas study unreliable, the party must submit a medical opinion that a condition suffered by the miner, or circumstances surrounding the testing, affected the results of the study and, therefore, rendered it unreliable. *Vivian v. Director, OWCP*, 7 B.L.R. 1-360 (1984) (miner suffered from several blood diseases); *Cardwell v. Circle B Coal Co.*, 6 B.L.R. 1-788

---

[8]A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values found in Appendices B and C of Part 718. *See* 20 C.F.R. § 718.204(b)(2)(i) and (ii). A "non-qualifying" test produces results that exceed the table values.

(1984) (miner was intoxicated). Similarly, in *Big Horn Coal Co. v. Director, OWCP [Alley]*, 897 F.2d 1045 (10th Cir. 1990) and *Twin Pines Coal Co. v. U.S. DOL*, 854 F.2d 1212 (10th Cir. 1988), the court held that the administrative law judge must consider a physician's report which addresses the reliability and probative value of testing wherein he or she attributes qualifying results to non- respiratory factors such as age, altitude, or obesity.

The arterial blood gas studies submitted after the previous denial conform to the applicable quality standards. The tests did not produce qualifying values, however. Accordingly, I find they present probative evidence weighing against a finding that Claimant is totally disabled.

Section 718.204(b)(2)(iii) provides that a claimant may prove total disability through evidence establishing cor pulmonale with right-sided congestive heart failure. This section is inapplicable to this claim because the record contains no such evidence.

Where a claimant cannot establish total disability under subparagraphs (b)(2)(i), (ii), or (iii), Section 718.204(b)(2)(iv) provides another means to prove total disability. Under this section, total disability may be established if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a respiratory or pulmonary impairment prevents the miner from engaging in his usual coal mine work or comparable and gainful work.

The weight given to each medical opinion will be in proportion to its documented and well-reasoned conclusions. A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). A report may be adequately documented if it is based on items such as a physical examination, symptoms and patient's history. *See Hoffman v. B & G Construction Co.*, 8 BLR 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984); *Buffalo v. Director,* OWCP, 6 BLR 1-1164, 1-1166 (1984); *Gomola v. Manor Mining and Contracting Corp.*, 2 BLR 1-130 (1979). A "reasoned" opinion is one in which the underlying documentation and data are adequate to support the physician's conclusions. *See Fields, supra*. The determination that a medical opinion is "reasoned" and "documented" is for this Court to determine. *See Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc).

I find Dr. Baker's opinion regarding Claimant's impairment level poorly reasoned. The doctor states that Claimant suffers from two separate impairments. First, he concludes that Claimant possesses a "Class II" impairment, and he cites Claimant's FEV_1 and vital capacity measures between 60% and 80% as his bases for such a conclusion. Dr. Baker, however, provides no more than this. He neither explains the severity of a "Class II" impairment nor does he attempt to address whether Claimant would be able to perform his usual coal mine employment with a "Class II" impairment. Accordingly, I grant his first impairment opinion little probative weight.

Secondly, Dr. Baker opines that Claimant's pneumoconiosis *alone* completely disables him from coal mine employment because he must avoid dusty environments. The doctor's premise is contrary to the Act, which clearly provides that Claimant's impairment level and status regarding pneumoconiosis are two different elements. Dr. Baker's premise that pneumoconiosis immediately impairs one from coal mine work is contrary to the Act and unreasoned, and I grant his second diagnosis no weight.

Dr. Simpao diagnosed a moderate respiratory impairment, and I find his opinion well reasoned and well documented. The doctor provides a clear rationale for his diagnosis, and it is supported by his documented objective testing and examination observations. Accordingly, I grant it probative weight.

Conversely, Dr. Dahhan opined that Claimant suffered from no respiratory impairment and retained the respiratory capacity to perform his usual coal mine employment. I also find Dr. Dahhan's opinion well reasoned and well documented. The doctor's diagnosis is supported by his reported objective data and examination observations. Accordingly, I grant his opinion probative weight.

In assessing total disability under § 718.204(b)(2)(iv), the administrative law judge, as the fact-finder, is required to compare the exertional requirements of the claimant's usual coal mine employment with a physician's assessment of the claimant's respiratory impairment. *Budash v. Bethlehem Mines Corp.*, 9 B.L.R. 1-48, 1-51 (holding medical report need only describe either severity of impairment or physical effects imposed by claimant's respiratory impairment sufficiently for administrative law judge to infer that claimant is totally disabled). Once it is demonstrated that the miner is unable to perform his or her usual coal mine work, a prima facie finding of total disability is made and the party opposing entitlement bears the burden of going forward with evidence to demonstrate that the miner is able to perform "comparable and gainful work" pursuant to § 718.204(c)(2). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988).

The narrative medical report evidence does not establish a level of respiratory impairment. Similar to the pneumoconiosis analysis above, I am left with the probative and opposite opinions of Dr. Dahhan and Simpao after I discard the opinion of Dr. Baker. I find the opinions of Drs. Dahhan and Simpao to be equally probative on the issue of Claimant's impairment. Accordingly, I find the evidence is in equipoise and insufficient to establish a level of impairment by a preponderance of the evidence. When I compare the impairment evidence with Claimant's truck driving job, which I find to be light, sedentary work, I must concluded that the narrative evidence does not establish total disability. The preponderance of the narrative evidence provides no barrier to Claimant driving his coal truck from the deep mine to the tipple.

Reviewing all of the evidence relevant to Claimant's impairment level, I find it does not support a determination of total disability. Neither the pulmonary function tests nor the arterial blood gas studies of record support a total disability finding. Furthermore, the narrative medical

reports do not establish a level of respiratory impairment that would hinder Claimant's ability to perform his usual coal mine employment. Accordingly, I conclude that Claimant is not totally disabled.

Conclusion

In sum, the evidence does not establish the existence of pneumoconiosis or a totally disabling respiratory impairment. Thus, Claimant has not established an element of entitlement previously adjudicated against him Accordingly, the refiled claim of James Estep must be denied.

Attorney's Fee

The award of an attorney's fee is permitted only in cases in which the claimant is found to be entitled to benefits. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to claimant for legal services rendered in pursuit of the claim.

ORDER

The claim of James Estep for benefits under the Act is denied.

A

JOSEPH E. KANE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty days from the date of this decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington D.C. 20013-7601. This decision shall be final thirty days after the filing of this decision with the district director unless appeal proceedings are instituted. 20 C.F.R. § 725.479. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20210.